In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 698

ERNEST O. D. CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals (Pet. 25–35) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. 25) was entered on September 28, 1965. The petition for a writ of certiorari was filed on October 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a criminal income tax prosecution the district court erred in holding that petitioner was not

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entitled to a credit for taxes allegedly "accrued" in favor of the Government of Canada.

STATUTES AND REGULATION INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

On April 12, 1962, a five-count indictment was filed against petitioner in the United States District Court for the Southern District of New York. Counts I, II, III and V charged that petitioner wilfully attempted to evade income tax for the years 1955 through 1958 by filing false and fraudulent tax returns which understated his income and tax. Count IV alleged that petitioner had made and used a false document (his 1957 income tax return), knowing it to contain a fictitious and fraudulent entry, in a matter within the jurisdiction of the Internal Revenue Service. (A.A. 2a–5a.) [1]

After a jury trial, petitioner was found guilty on all counts. On December 16, 1964, the court imposed concurrent prison sentences of one year and one day on each count and fined petitioner $5,000 each on counts I, II and IV. (A.A. 7a–8a.) The court of appeals affirmed. (Pet. 25–35.)

The evidence to support the verdict may be summerized briefly as follows:

Counts I and II. Although petitioner reported less than $9,000 of adjusted gross income on his 1955

[1] "A.A." refers to the Appellant's (petitioner's) Appendix in the court below. "G.A." refers to the Appellee's (government's) Appendix in the court below.

return, the government's figures showed that he had received adjusted gross income of $433,910.99, consisting mainly of a long-term capital gain from the sale of stock in Campbell-Chibougamau Mines, Ltd. (A.A. 109a, 138a, 150a; G.A. 15a–16a, 48a). For 1956 the comparable figures are $16,857.11 reported as against a true figure of $81,898.84, an understatement which again resulted mainly from profit on the sale of stock in Campbell-Chibougamau Mines, Ltd. (A.A. 138a, 150a; G.A. 50a). Petitioner does not deny that these gains should have been reported on his tax returns (Pet. 3), but claims that substantially all the federal income tax due as a result of these transactions would be offset by credits for taxes accrued in favor of the Government of Canada on the same income. However, the evidence at trial demonstrated that petitioner sold the stock in the names of nominees (A.A. 109a; G.A. 6a–11a, 27a–29a) and did not report the gains to the Canadian income tax authorities (A.A. 18a, 133a, 153a). Instead he advised the Canadian tax authorities in writing that he was a nonresident of Canada domiciled in New York City (G.A. 23a, 43a). After investigation the Canadian authorities uncovered the profits here in question and assessed a deficiency against petitioner (A.A. 18a, 133a, 153a), which still had not been paid at the time of the trial late in 1964 (A.A. 19a, 119a, 128a–129a).

Count III. The evidence indicates that in 1957 petitioner received $3,000 of unreported interest income on 3% Government of Canada bonds which he held until July of that year. (A.A. 26a–27a, 135a–

139a.) Petitioner did not deny receipt of this unreported income when he testified at the trial and does not seriously contend now that the proof in that regard is inadequate.

Counts IV and V. In 1957 petitioner listed an alleged capital loss of $113,342.09 purportedly on the sale of 133,000 shares of Ford Highwood Collieries, Ltd. (G.A. 52a). The "sale" was actually a transfer from petitioner to Elspeth Irvine—the maiden name of petitioner's wife—and the new stock certificate was delivered to petitioner himself. (G.A. 8a, 13a–14a, 37a, 60a.) Petitioner conceded on the witness stand that the sales price used in the transfer was "arbitrary" (G.A. 37a) and that he continued to invest money in the successor company (*id.*).

ARGUMENT

Inasmuch as the concurrent prison sentences were imposed with respect to each of the five counts, any error in Counts I and II—the only two counts petitioner seriously attacks in his petition—would affect only the amounts of the fines collectible. *Lawn* v. *United States,* 355 U.S. 339, 362; *Hirabayashi* v. *United States,* 320 U.S. 81, 85. There is, however, no merit in petitioner's contentions. The district court was clearly correct in holding as a matter of law that petitioner was not entitled to the foreign tax credit as an offset to the tax deficiencies on the unreported income from the sale of the stock of Campbell-Chibougamau Mines, Ltd.

1. Section 901 of the Internal Revenue Code of 1954 allows a taxpayer a credit against his federal income

tax liability for income taxes paid or accrued to a foreign government on income earned from sources outside the United States. The purpose of this provision is to prevent an American taxpayer from having to pay two taxes on the same income. *Associated Tel. & Tel. Co.* v. *United States*, 306 F. 2d 824 (C.A. 2), certiorari denied, 371 U.S. 950. In the instant case, however, it is clear that petitioner was not seeking to avoid double taxation, but to evade the taxes due *both* governments. Petitioner did not report his large profits on the Campbell-Chibougamau stock to either the United States or to the Canadian government. He would have been liable for Canadian tax on these gains only if he were a Canadian citizen, a resident of Canada, or had lived in Canada for more than 180 days (A.A. 18a). Petitioner had previously informed the Canadian government that he was a nonresident alien (G.A. 23a) and when in 1956 the Canadian Department of National Revenue sent him blank returns for one of the years here in question, he replied that he was "surprised" to find them because (G.A. 43a):

> As you probably already know, I am, and always have been a citizen of the United States, and whatever income I earned in Canada, I included in my returns for the aforementioned years [1954 and 1955], which I filed in New York.

Only after the United States had made a criminal case against him did he testify at his 1964 criminal trial that in his heart he had considered himself a resident of Canada until 1957 (G.A. 22a). The con-

clusion is inescapable that petitioner's subsequent admission of liability for 1955–1956 Canadian income taxes—none of which had been paid at the time of the trial (A.A. 19a, 119a, 128a–129a)—was made solely in an attempt to escape criminal liability for his attempted evasion. As the court below put it, the "relief from double taxation provided by Congress was obviously not meant as an incentive to encourage such reluctant taxpayers to conceal their income from both countries in the hope that their omission would be entirely overlooked." (Pet. 32–33).

It is clear that during 1955 and 1956 petitioner had no intention of paying the Canadian taxes. In these circumstances no Canadian tax can be said to have accrued in 1955 and 1956 within the meaning of Section 901. Cf. *United States* v. *Consolidated Edison Co.*, 366 U.S. 380; Rev. Rul. 58–55, 1958–1 Cum. Bull. 266.[2]

2. Regardless of whether the Canadian taxes can be said to have accrued in 1955 and 1956, the Code requires a taxpayer to make certain disclosures and take certain acts before he will be entitled to a credit for accrued but unpaid foreign taxes. In order to prevent taxpayers from claiming credits for foreign taxes they have not paid, and may never pay, the Code specifically states that such "credits * * * shall be

[2] It is irrelevant for the purpose of this case whether, if petitioner eventually pays the Canadian tax, he will be entitled to a deduction or credit and, if a credit, whether it will be considered to relate back to his 1955 and 1956 tax years. See Rev. Rul. 58–55, 1958–1 Cum. Bull. 266. The important fact here is that the foreign tax liabilities cannot be said to have accrued in 1955 and 1956.

allowed only if the taxpayer establishes to the satisfaction of the Secretary [of the Treasury] or his delegate * * * the amount of income derived from each country, the tax paid or accrued * * * which is claimed as a credit, * * * and * * * all other information necessary for the verification and computation of such credits," and gives the Secretary or his delegate the power to require "as a condition precedent to the allowance of this credit" that "the taxpayer * * * give a bond" to cover any tax which may become due if the taxpayer fails to pay the foreign tax. Internal Revenue Code of 1954, § 905 (b), (c). During the tax years here in question petitioner supplied the Commissioner with no information regarding the alleged Canadian taxes. His returns disclosed neither the existence nor the amount of the gains on the sale of the stock and the Canadian tax, all of which the statute specifically required him to disclose in order to qualify for the credit.

Indeed the statute is clear that the Commissioner may require a taxpayer who is claiming credit for an accrued but unpaid foreign tax to post a bond to cover the U.S. tax which may be due in case the taxpayer fails to pay the foreign tax, thus defeating the credit. It is equally clear that if the taxpayer fails to post the required bond, the credit will be disallowed. By deliberately failing to inform the Commissioner that he was claiming a credit for an unpaid foreign tax, petitioner prevented the Commissioner from requiring him to post a bond. If a taxpayer's failure to post a bond when requested by the Commis-

sioner to do so defeats the credit, certainly a taxpayer's deliberate failure to inform the Commissioner that he is claiming a credit for accrued but unpaid foreign taxes should have the same effect.

3. Since petitioner was not entitled to the foreign tax credit, there is no merit in the argument that the jury should have been permitted, under the doctrine of *Sansone* v. *United States*, 380 U.S. 343, to find him not guilty of wilfully attempting to evade his taxes under Section 7201 of the Code but guilty of wilfully filing a return which he knew to be false under Section 7207.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

DECEMBER 1965.

APPENDIX

Internal Revenue Code of 1954:

SEC. 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) *Allowance of credit.*

If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. Such choice may be made or changed at any time prior to the expiration of the period prescribed for making a claim for credit or refund of the tax again which the credit is allowable * * *.

(b) *Amount allowed.*

Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) Citizens and domestic corporations.

In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *

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[26 U.S.C. 901.]

SEC. 905. APPLICABLE RULES.

(a) *Year in which credit taken.*

The credits provided in this subpart may, at the option of the taxpayer and irrespective of

the method of accounting employed in keeping his books, be taken in the year in which the taxes of the foreign country or the possession of the United States accrued, subject, however, to the conditions prescribed in subsection (c). If the taxpayer elects to take such credits in the year in which the taxes of the foreign country or the possession of the United States accrued, the credits for all subsequent years shall be taken on the same basis, and no portion of any such taxes shall be allowed as a deduction in the same or any succeeding year.

(b) *Proof of credits.*

The credits provided in this subpart shall be allowed only if the taxpayer establishes to the satisfaction of the Secretary or his delegate—

(1) the total amount of income derived from sources without the United States, determined as provided in part I,

(2) the amount of income derived from each country, the tax paid or accrued to which is claimed as a credit under this subpart, such amount to be determined under regulations prescribed by the Secretary or his delegate, and

(3) all other information necessary for the verification and computation of such credits.

* * * * *

(c) *Adjustments on payment of accrued taxes.*

If accrued taxes when paid differ from the amounts claimed as credits by the taxpayer, or if any tax paid is refunded in whole or in part, the taxpayer shall notify the Secretary or his delegate, who shall redetermine the amount of the tax for the year or years affected. The amount of tax due on such redetermination, if any, shall be paid by the taxpayer on notice and demand by the Secretary or his delegate,

or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with subchapter B of chapter 66 (sec. 6511 and following). In the case of such a tax accrued but not paid, the Secretary or his delegate, as a condition precedent to the allowance of this credit, may require the taxpayer to give a bond, with sureties satisfactory to and to be approved by the Secretary or his delegate, in such sum as the Secretary or his delegate may require, conditioned on the payment by the taxpayer of any amount of tax found due on any such redetermination; and the bond herein prescribed shall contain such further conditions as the Secretary or his delegate may require. * * *
[26 U.S.C. 905.]

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
[26 U.S.C. 7201.]

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.
[26 U.S.C. 7207.]

18 U.S.C. 1001. STATEMENTS OR ENTRIES GENERALLY.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Treasury Regulations on Income Tax:

Sec. 1.905–2. *Conditions of allowance of credit.*

(a) ***Forms and information.***—(1) Whenever the taxpayer chooses, in accordance with paragraph (d) of § 1.901–1, to claim the benefits of the foreign tax credit, the claim for credit shall be accompanied by Form 1116 in the case of an individual or by Form 1118 in the case of a corporation.

(2) The form must be carefully filled in with all the information called for and with the calculations of credits indicated. Except where it is established to the satisfaction of the district director that it is impossible for the taxpayer to furnish such evidence, the form must have attached to it (i) the receipt for each such tax payment if credit is sought for taxes already paid or (ii) the return on which each such accrued tax was based if credit is sought for taxes accrued. This receipt or return so attached must be either the original, a duplicate original, a duly certified or authenticated copy, or a sworn copy. In case only a sworn copy of a receipt or return is attached, there must be kept readily available for comparison on request the original, a duplicate original, or a duly certified or authenticated copy. If the

receipt or the return is in a foreign language, a certified translation thereof must be furnished by the taxpayer. Any additional information necessary for the determination under part I (section 861 and following), subchapter N, chapter 1 of the Code, of the amount of income derived from sources without the United States and from each foreign country shall, upon the request of the district director, be furnished by the taxpayer.

(b) *Secondary evidence.*—Where it has been established to the satisfaction of the district director that it is impossible to furnish a receipt for such foreign tax payment, the foreign tax return, or direct evidence of the amount of tax withheld at the source, the district director, may, in his discretion, accept secondary evidence thereof as follows:

(1) *Receipt for payment.*—In the absence of a receipt for payment of foreign taxes there shall be submitted a photostatic copy of the check, draft, or other medium of payment showing the amount and date thereof, with certification identifying it with the tax claimed to have been paid, together with evidence establishing that the tax was paid for taxpayer's account as his own tax on his own income. If credit is claimed on an accrual method, it must be shown that the tax accrued in the taxable year.

(2) *Foreign tax return.*—If the foreign tax return is not available, the foreign tax has not been paid, and credit is claimed on an accrual method, there shall be submitted—

(i) A certified statement of the amount claimed to have accrued,

(ii) Excerpts from the taxpayer's accounts showing amounts of foreign income and tax thereon accrued on its books,

(iii) A computation of the foreign tax based on income from the foreign country

carried on the books and at current rates of tax to be established by data such as excerpts from the foreign law, assessment notices, or other documentary evidence thereof,

(iv) A bond, if deemed necessary by the district director, filed in the manner provided in cases where the foreign return is available, and

(v) In case a bond is not required, a specific agreement wherein the taxpayer shall recognize its liability to report the correct amount of tax when ascertained, as required by the provisions of section 905(c).

If at any time the foreign tax receipts or foreign tax returns become available to the taxpayer, they shall be promptly submitted to the district director.

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